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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1995

STATE OF MISSISSIPPI ON RELATION OF
ERNEST HOLMES & CEOLA JAMES
Petitioner,

vs.

WILLIAM L. "BILL" GRIFFIN, JR.
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether interpretation of Article 6 Section 154 of the Mississippi Constitution by the Mississippi Supreme drew into question the Constitutionality of its application, even although Article 6, Section 154 of the Mississippi Constitution appears valid on its face?

(2) Whether Article 6, Section 154 of the Mississippi Constitution affords equal protection, and due process to residents of Mississippi?

(3) Whether important issue which draws into question the Constitutionality of Article 6 Section 154 of Mississippi Constitution should be addressed by the United States Supreme Court in view of fact that question has been interpreted by higher State Courts in other jurisdictions?

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IN THE
SUPREME COURT OF MISSISSIPPI
October Term, 1995

STATE OF MISSISSIPPI ON RELATION OF
ERNEST HOLMES

Petitioner,

vs.

WILLIAM L. "BILL" GRIFFIN, JR.

Respondent,

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

COMES NOW, State of Mississippi, on relation of Ernest Holmes and Ceola James, and files this Petition for a Writ of Certiorari, and Petitioner would set our the following matters in support thereof:

I.

STATEMENT OF JURISDICTION: An Order was entered in this case on November 30, 1995 by the Supreme Court of

Mississippi denied the Petition for Rehearing on February 15, 1996. The Mississippi Supreme Court granted a stay of the Mandate until 30 days following its entry on February 22, 1996. An additional 15 day stay was granted on March 25, 1996. The stay ends on April 9, 1996. (See Appendix, pages 40 and 43).

II.

THE BASIS FOR FEDERAL JURISDICTION:

Article 6, Secton 154 of the Mississippi Constitution appears to be valid on its face, but the interpretation given the Constitution by the Mississippi Supreme Court draws into question the Constitutionality of the Mississippi Constitution in that the interpretation appears to be unconstitutional in its application in that it does not provide equal protection, and due process to the residents of Mississippi. (U.S. Constitution, Amendment XIV) Petitioner invokes 28 U.S.C., Section 2403 (b). The important questions presented by the Mississippi Constitution in view of the fact that other State Supreme Courts have addressed this problem, seems worthy of Certiorari.

III.

CONSTITUTIONAL PROVISIONS: Article 6, Section 154 of the Mississippi Constitution provides:

> no person shall be eligible to the office of judge, of the Circuit Court or of the Chancery Court who shall not have been a practicing lawyer for five years and who shall not have attained the age of twenty-six years, and who shall not have been five years a citizen of this state.

The words "immediately preceding" the election or appointment are not used. The Mississippi Supreme Court Construed the Constitution as meaning a resident and practicing attorney for five years during the attorney's life time and not immediately preceding the election. This construction throws out basic residence requirements for Chancery and Circuit Judges and thereby provides unequal treatment to the residents of Mississippi, since all other judges including Justice Court Judges must meet their residence requirements and other requirements "immediately preceding" the election or appointment. The Constitutionality of the application of the Mississippi Constitution is invoked under 28 U.S.C., Sec-

tion 2403 (b). This case also involves the Fourteenth Amendment to the United States Constitution, which provides in pertinent part:

> ...nor shall any state deprive a person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

STATEMENT OF THE CASE: This case involves an election contest that took place in the Ninth Chancery District of Mississippi. Article 6, Section 154 of the Mississippi Constitution sets out that in order to qualify for Chancery or Circuit judge, a party must be a resident of the state and a practicing attorney for five (5) years. The words "immediately preceding" the election or appointment were not used. Basically, the Respondent admits that he left the state of Mississippi in 1986, and came back in 1992. His contention is that he does not have to be a resident of the state and a practicing attorney for five (5) years immediately preceding the elect-

tion. All other judgeships in Mississippi, including Justice Court Judges, have a residence requirement immediately preceding the election or appointment. The interpretation given by the Mississippi Supreme Court would allow Chancery and Circuit Judges to be a resident and practicing attorney for five (5) years at anytime in their life. This interpretation is impractical, and it creates a situation for Circuit and Chancery Judges which fails to provide equal protection to the citizens of Mississippi. It also undermines all of the fundamentals of having a party to be familar with Mississippi law.

There were many other issues involved in this case, but they were basically resolved by the Mississippi Supreme Court.

IV.

ARGUMENT

(1) Whether interpretation of Article 6, Section 154 of the Mississippi Constitution by the Mississippi

Supreme Court drew into question the constitutionality of its application, even though Article 6, Section 154 of the Mississippi Constitution appears valid on its face?

The decision as rendered by the Mississippi Supreme Court draws into question the constitutionality of Article 6, Section 154 of the Mississippi Constitution for several reasons. Article 6, Section 154 of the Mississippi Constitution appears to be valid on its face. However, the construction of the constitution appears to make it unconstitutional in its application. In other words, the Mississippi Constitution, as interpreted, appears to draw into question basic issues of fairness among Mississippi residents. The impractical applications of the decision made by the Mississippi Supreme Court which draws into question the constitutionality of its application are as following:

1. The Respondent has not been in the business of practicing law in Mississippi since 1986 as

he admits. It is unclear as to whether the Respondent had maintained the standing of a practicing attorney when he returned to Mississippi in 1992. Since attorneys who practice law in Mississippi must take twelve (12) hours of mandatory continuing legal education hours per year, and also pay mandatory bar dues, Petitioner feels that a person who desires to be a judge of the chancery or circuit court should at least maintain the standing of a practicing attorney for five (5) years immediately preceding his election or appointment.

2. Even though the Respondent has not been in the business of practicing law in Mississippi since 1986, Respondent is the Senior Chancellor for the Ninth Chancery District. This is based on the fact that he has been a member of the Mississippi bar since 1975, even though one can remain in inactive status by paying bar dues, but in order to maintain the standing of a practicing attorney, one must pay mandatory continuing legal education courses and pay mandatory bar dues.

3. The ruling of the Mississippi Supreme Court undermines all resident requirements for other judgeships in Mississippi. The Constitution wold have to be rewritten to require that all judges can be a resident of the State of Mississippi and meet other basic requirements at an time in their life in order to give residents equal treatment. This certainly would not be in the best interest of the State of Mississippi or any other state.

4. The ruling of the Mississippi Supreme Court allows candidates for circuit and

chancery judgeships to be a resident of the State of Mississippi and a practicing attorney at any time in their life and qualify for chancery or circuit judgeships. This creates irreparable harm on the State of Mississippi.

5. **The Mississippi Supreme Court improperly interpreted the Mississippi Constitution, which makes it unconstitutional in its application.**

6. The decision of the Mississippi Supreme Court implies that the court is willing to render an impractical decision in order to keep a candidate in office, even though the interpretation is against the clear intent of the framers of the Constitution of 1890. Ambiguity should be resolved in favor of eligibility to hold office, but courts should not give words an unreasonable construction. 67 C.J.S., officers, Section 17, pages 259, 260. Taking it a step further, Courts should not give interpretations that draws into question the constitutionality of a state constitution.

In **The Mississippi Constitution**, George H. Ethridge, Associate Justice, Supreme Court of Mississippi, Copyright, 1928: Tucker Printing House, Jackson, Miss., Justice Ethridge writes:

> A man must have been a practicing attorney as distinguished from a mere student, because in the school of practice is better presented the force and effect of the various theories and principles of law...he is more thoughtful and painstaking in developing the faced by an adversary, who is develop-

> ing the contrary theory with all his possible force, influenced a good deal by his interest, and such an adversary can frequently drive home ideas and theories that would not occur to a single person in quiet study, no matter how intellectual his mind, or how able a reasoner he may be.
>
> The practice of law reduces theory to practice and judges should be practical men; and should be able to put into practice the principles and theories of law. (Article 6, Section 150, Supreme Court Judges) Ibid,

The Mississippi Constitution.

In this publication, The Mississippi Constitution, the writer, Justice George G. Ethridge, states that the same rationale is used for circuit and chancery judges as for supreme court judges, but he does not elaborate on the language "immediately preceding," or "next preceding."

(2) Whether the interpretation of Article 6, Section 154 of the Mississippi Constitution affords equal protection and due process to residents of Mississippi?

Article 6, Section 150 of the Mississippi Constitution provides, "No person shall be eligible to hold the office of judge of the supreme court who shall not have attained the age of thirty (30) years at the time of his appointment,

and who shall not have been a practicing attorney and a citizen of this state for five (5) years immediately preceding his appointment. Section 9-4-1, MCA, 1972 provides that "No person shall be eligible for the office of judge of the court of appeals who has not attained the age of thirty (30) years at the time of his election, and who has not been a practicing attorney and citizen of the state for five years immediately preceding such election. Article 6, Section 171 of the Mississippi Constitution requires that Justice Court Judges "shall have resided two years in the county next preceding the election.."

Since the Justice Court is not a court of record and it has a residence requirement next preceding the election, certainly Chancery and Circuit judges should not be allowed to meet their requirements at five years during any time in their life.

One other jurisdiction has addressed an issue similar to the issue in this case, but the decision is not binding on Mississippi. In the case of **Hannett v. Jones**, 722 P. 2d 643 (N.M. 1986), the

New Mexico Constitution required that to hold the office of Justice of the Supreme Court, the person must "...have been in actual practice of law and resided in the state territory of New Mexico for at least three years.." The words "immediately preceding" were not used. The Court held that the actual practice of law and residence in the state meant three years immediately taking office. The Court noted that there were two possible interpretations:

(1) That the party be both a practicing attorney and a resident of the state for a continuous period of three (3) years.

(2) That the party shall have resided in the state and practiced law at any time during his life for a period of three years.

The court, in upholding the "immediately preceding" and continuity of residence and practicing law noted that with the second interpretation, a person could live in the state as a child, practice law

as a young adult for three years, live in other states, pursue other matters for several decades, and come back to the state and seek a judgeship. To uphold the second requirement would mean that a person would not necessarily have to be familar with state law, more particularly recent state law.

The interpretation of Article 6, Section 154 of the Mississippi Constitution does not provide equal protection and due process for its residents. In the instant case, the Respondent served as CEO for a publishing company in California from 1986 until 1992. When the Respondent returned to Mississippi in 1992, he started a horse farm as opposed to opening a law office or holding himself out to the public as a practicing attorney. By becoming chief Chancellor for the Ninth Chancery District, the Respondent has simply bypassed the other Chancellors, even though he has not been in the business of practicing law in Mississippi since 1986 prior to becoming a Chancellor in 1995. The Respondent did not put on any testimony in his behalf, so it is unclear as to whether he maintained the standing of a practicing attorney or whether he simply maintained his status as a member of the Mississippi Bar Association without taking

the required continuing legal education courses. The Respondent represented through his attorney that he had practiced some law, but he did not answer any specific questions. The Mississippi Supreme Court, by its interpretation, has **created unequal application of its laws** that is both impractical and unreasonable in order to keep the Respondent in office. There exists no legitimate state interest for creating this exception, and the broad implication of this interpretation creates a chilling effect and irreparable harm on the residents of the State of Mississippi.

(3) Whether important issue which draws into question the constitutionality of Article 6, Section 154 of the Mississippi Constitution should be addressed by the United States Supreme Court in view of the fact that question has been interpreted by higher courts in other jurisdictions.

Certiorari should be granted on this important question involving the Mississippi Constitution. petitioner raised the issue of the impractical and unequal treatment caused by the ruling of Mississippi Supreme Court in the Petitioner's Petition for Rehearing before the Mississippi Supreme Court. This

was done by pointing out the unequal treatment afforded residents who apply for judgeships. Residents must study and stay familar with the law and state. The same issues of unequal treatment are be-submitted to this court for consideration. Justice McRae, in his dissenting opinion, also pointed out the unequal application of the laws of the Mississippi Constitution that was brought out by this decision. (See Appendix, p. 35) This Justice pointed out that this ruling created arbitrary qualifications for circuit and chancery judges. (See Appendix, p. 37).

First Amendment rights are not to be abridged or even chilled by statutory vagueness. 16 C.J.S., Constitutional Law, Section 459. Article 6, Section 154 of the Mississippi Constitution is subject to a challenge of vagueness, because an unconstitutional construction and application of state constitutional provisions has been applied to persons who qualify for circuit and chancery judgeships.These provisions do not exist for other judges in Mississippi. The basic policies that are furthered by the doctrine of vagueness are... to prevent discretionary and arbitrary enforcement by providing clear standards to those who apply statutory rules, and to prevent infringement on con-

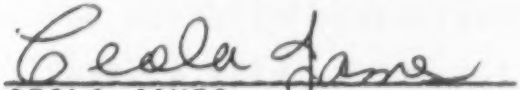
stitutionally protected activity. Ibid, 16 C.J.S., constitutional law, Section 459

There is no legitimate state interest to be served by the present construction of Article 6, Section 154 of the Mississippi Constitution. In order for a statute to survive (state constitution in the present case) when confronted with due process of law, it must not appear to be arbitrary or capricious, but must have a reasonable relation to a legitimate end. **Saucier v, Life & Casualty Insurance Co.,** (1940) 189 M. 693, 198 So. 625. A classification is constitutionally permissible whenever it proceeds upon any difference which has a reasonable relation to the subject sought to be accomplished. **State ex rel. Jordon v. Gilmer Grocery Co.,** 156 M. 99, 125 So. 710. Also, the legislature in enacting laws must embrace all of a stated class. **Clark v. State** 169 M. 369, 152 S. 820. The classification given in the present case does not include all judges in Mississippi, and there is no legitimate state interest to be served by creating arbitrary qualifications for chancery and circuit judges.

CONCLUSION

Petitioner respectfully submits that the Petition for a Writ of Certiorari should be granted for the reasons set out herein.

Respectfully submitted,



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IN THE
SUPREME COURT OF MISSISSIPPI
NO. 94-CA-01275-SCT

STATE OF MISSISSIPPI ON RELATION OF
ERNEST HOLMES

vs.

DECIDED
NOV 30 1995

WILLIAM L. "BILL" GRIFFIN, JR.

BEFORE HAWKINS, C.J. ROBERTS AND
SMITH, J.J. ROBERTS, JUSTICE, FOR
THE COURT:

INTRODUCTION

This case presents a unique first impression question regarding our state constitutional qualifications under Article 6, Section 154 for the elected public office of chancellor in Mississippi. We find that the drafters of the Mississippi Constitution of 1890, specifically Section 154 of Article 6, in-

tended that an attorney's eligibility for said office does not require that he be a Mississippi resident for the five years **immediately preceding** an election for chancellor. Accordingly, we affirm the lower court's interpretation of Article 6, Section 154 of the Mississippi Constitution of 1890 as it is without error.

STATEMENT OF THE CASE

This case began procedurally on November 28, 1994, with the filing of Ernest Holmes' (hereinafter Holmes) Contest of Qualifications of Candidate After First Primary Held During The General Election in the Circuit Court of Washington County, Mississippi. Said action was originally filed pursuant to Miss. Code Ann. §11-39-1 et seq. naming the people of the state of Mississippi as the plaintiffs on relation of Holmes in his capacity as a private person and registered voter residing in Greenville, Washington County with Ceola James (hereinafter James) acting as his attor-

ney. James subsequently "co-signed" the complaint during the trial but Judge Evans held this to be of no effect. Holmes was the campaign manager of James who lost the November 8, 1994, election for chancery court judge of Chancery District Nine, Subdistrict One which was created by House Bill 1809.

Holmes sought to have the certification of William L. "Bill" Griffin, Jr. (hereinafter Griffin) as the winner declared null and void for failure by Griffin to comply with the requirements of Article 6, Section 154 of the Mississippi Constitution of 1890. It was alleged that Griffin had not been a practicing attorney or a resident of the State of Mississippi for the five years **immediately preceding** the election which allegedly made Griffin ineligible. Therefore, Holmes alleged that this would require the other candidate, James, to be declared the winner.

Griffin filed his Answer on December 6, 1994, alleging that Holmes' pleading had failed to state a claim

upon which relief could be granted, failed to join the necessary parties, i.e., James, that Griffin had not yet taken office to be subject to a writ of quo warranto summons, and that Article 6, Section 154 did not require a candidate for chancery judge to be a resident and practicing attorney for the five years immediately preceding the election. Trial was scheduled for December 12, 1994.

The Honorable Gray Evans was the circuit judge presiding over the December 12, 1994, trial. Judge Evans heard arguments from both parties and dismissed the complaint but rendered a ruling on December 15, 1994. Judge Evans ruled against Holmes and James by dismissing the case and finding (1) that Holmes did not have standing, (2) that the application for Writ Quo Warranto was denied because Griffin had not take office yet, and (4) that Holmes essentially wanted the court "to rewrite the Constitution and insert the wards 'immediately preceding' before the words 'citizen of this state' and likewise to insert those

same words before the phrase following the limitation that a candidate be a practicing lawyer for five years." Judge Evans ruled that he was "absolutely convinced that Plaintiff's suggestion that these words were unintentionally omitted from the Constitution of 1890 is without merit."

Aggrieved by Judge Evans' ruling, Holmes, with James as his attorney, filed his notice of appeal seeking an expedited ruling by this Court on the following issues:

I. WHETHER THE APPELLEE MEETS THE REQUIREMENTS OF ARTICLE 6, SECTION 154 OF THE MISSISSIPPI CONSTITUTION?

II. WHETHER CEOLA JAMES IN ENTITLED TO BE DECLARED THE WINNER OF THE ELECTION OR WHETHER A SPECIAL ELECTION SHOULD BE DECLARED?

Griffin did not cross-appeal but rather stated the following as the issues for appeal.

I. DID APPELLANT, ERNEST HOLMES, (OR CEOLA JAMES, SHOULD SHE BE DEEMED AN APPELLANT), HAVE STANDING TO BRING AN ACTION IN THE NATURE OF QUO WARRANTO? IS CEOLA JAMES PROPERLY AN APPELLANT? DID HER SIGNING THE COMPLAINT IN COMPLIANCE WITH RULE 11 LEAD COUNSEL FOR THE APPELLEE OR FOR THE CIRCUIT COURT TO TREAT HER AS A PLAINTIFF OR PARTY IN INTEREST? IS THE ISSUE OF CEOLA JAMES' ENTITLEMENT TO THE OFFICE AS A RESULT OF BEING A SECOND PLACE FINISHER IN AN ELECTION, ENTITLED TO ASSUME THE OFFICE IN THE EVENT THE ELECTED CANDIDATE IS NOT CONSTITUTIONALLY QUALIFIED?

II. WAS APPELLANT'S ACTION IN THE NATURE OF WRIT OF QUO WARRANTO, WHICH WAS COMMENCED BEFORE THE APPELLEE ASSUMED OFFICE PREMATURE?

III. DOES ARTICLE 6, SECTION 154 OF THE MISSISSIPPI CONSTITUTION OF 1890 REQUIRE THAT A CHANCELLOR PRACTICE LAW IN AND BE A RESIDENT OF MISSISSIPPI FOR A FIVE YEAR PERIOD IMMEDIATELY PRECEDING HIS ELECTION, OR DOES IT MERELY REQUIRE THAT AN ELECTED CHANCELLOR HAVE PRACTICED LAW AND LIVED IN MISSISSIPPI FOR A PERIOD OF FIVE YEARS?

IV. CAN APPELLANT NOW ARGUE THAT APPELLEE WAS NOT A PRACTICING ATTORNEY AT THE TIME OF THE ELECTION?

STATEMENT OF THE FACTS

The facts of this case are limited, undisputed and begin on November 8, 1994, with the chancery judge election for Chancery District Nine, Subdistrict One between William L. "Bill" Griffin, Jr. and Ceola James. The incumbent, Chancellor Nathan P. Adams, Jr., did not run for reelection. Griffin received the majority of votes and was certified

as the winner and new chancellor for said district.

Subsequently, James decided that Griffin had not met the constitutional requirements under her interpretation of Section 154. Holmes raised these concerns in his contest motion wherein James was not a party and instead acted as counsel for Holmes. However, James "co-signed" the complaint during the trial.

The beginning of the trial reflects that Judge Evans was concerned with the treshold issue of Holmes' standing and in what capacity James was acting for these proceedings. The court requested that James read the brief submitted by Griffin alleging the lack of standing. James suggested that she would "co-sign" the complaint if needed to resolve an possible standing problem that Holmes may have had and did sign it before the arguments on the merits began. James asked the court to only rule upon the issue of the cnstitutional requirement of the office of chancery

judge under Art. 6 Section 154. Judge Evans moved forward with the proceedings to hear arguments concerning the constitional requirements while reserving a ruling at that time on the standing issue.

James presented her argument which essentially amounted to a suggestion to the trial court to interpret Section 154 as impliedly requiring that the five-year requirement mean "immediately preceeding" the election and not five years at any time prior to the election for chancellor. Stephen Thomas (hereinafter Thomas), representing Griffin, followed with his arguments that Section 154 does not require that the candidate be a resident and practicing attorney "immediately preceding" the election. Thomas argued that the Constitution of 1890 and its three predecessors never included such language and that there were many other sections with similar requirements that did include the "immediately preceding" language impliedly indicating that the absence of

such language was not and oversight by the drafters of the Constitution of 1890. No testimony was given by Griffin.

The parties stipulated to the following facts at the conclusion of the trial. (1) Griffin was not a resident of the State of Mississippi and did not practice law for the five years immediately preceding the election, (2) Griffin had been a citizen of Mississippi for over thirty-five years, (3) Griffin had continuously been a member of the Mississippi bar since 1975, (4) Griffin actively practiced law in Mississippi from 1975 to 1986, (5) Griffin practiced law from1986 to 1992 in California in a corporate capacity, (6) Griffin practiced law in Mississippi from 1992 to present on limited basis, (7) Holmes did not claim an entitlement to the office of chancellor of the Ninth Chancery District, (8) Griffin received, which was verified by the appropriate election officials, the majority of votes for the office of chancellor of Subdistrict 1 of the Ninth Chancery District on November 8, 1994, and (9) that the only dispute

was the interpretation of Section 154.

DISCUSSION OF ISSUES

I. DID APPELLANT, ERNEST HOLMES (OR CEOLA JAMES, SHOULD BE DEEMED AN APPELLANT), HAVE STANDING TO BRING AN ACTION IN THE NATURE OF QUO WARRANTO? IS CEOLA JAMES PROPERLY AN APPELLANT? DID HER SIGNING THE COMPLAINT IN COMPLIANCE WITH RULE 11 LEAD COUNSEL FOR THE APPELLEE OR FOR THE CIRCUIT COURT TO TREAT HER AS A PLAINTIFF OR PARTY IN INTEREST? IS THE ISSUE OF CEOLA JAMES' ENTITLEMENT TO THE OFFICE AS A RESULT OF BEING A SECOND PLACE FINISHER IN AN ELECTION PROPERLY BEFORE THIS COURT? IF SO, IS CEOLA JAMES, AS A SECOND PLACE FINISHER IN AN ELECTION, ENTITLED TO ASSUME THE OFFICE IN THE EVENT THE ELECTED CANDIDATE IS NOT CONSTITUTIONALLY QUALIFIED?

II. WHETHER CEOLA JAMES IS ENTITLED TO BE DECLARED THE WINNER

OF THE ELECTION OR WHETHER A SPECIAL ELECTION SHOULD BE DE CLARED?

III. WAS APPELLANT'S ACTION IN THE NATURE OF WRIT OF QUO WARRANTO, WHICH WAS COMMENCED BEFORE THE APPELLEE ASSUMED OFFICE PREMATURE?

Prior to the adoption of our rules of civil procedure, there were two forms of a writ of quo warranto; a public and a private writ.[1],[2] The distinction

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[1]With the adoption of the Mississippi Rules of Civil Procedure, effective January 1, 1982, the writ of quo warranto was abolished as a distinct and separate form of action. See, **Dye v. State ex rel. Hale,** 507 Do. 2d 332, 337 n.4 (Miss. 1987) (discussion of abolition of writ of quo warranto). However, Appendix B to the Rules provides that,

> The form of relief formerly obtainable under the writ of quo warranto, shall hereafter be obtained by motions or actions specifically seeking relief.. ..

[2]The substantive principle of the writ of quo warranto was preserved and recently reaffirmed in **Barlow v. Weathersby,** 597 So. 2d 1288, 1293 (Miss. 1992).

between the public and private quo warranto actions is significant. In a public action the respondent has the burden of proving his entitlement to the office against a challenge from the state by either the district attorney or the attorney general. **Jones v. State,** 42 So. 2d 123, 125 (Miss. 1949). On the other hand, a private quo warranto action is required to be brought on behalf of the state by the person claiming an entitlement to the office which puts the burden on the plaintiff to establish his entitlement to the office. **Andrews v. Covington,** 69 Miss. 740, 746 (1892). Also, the relator in a private writ of quo warranto must stand on the strength of his entitlement to the office as opposed to the weaknesses of the person alleged as not properly holding the office. **State v. Tucei,** 166 So. 370, 370 (Miss. 1936).

Therefore, in comparison to a public writ, a person need not have the private petition for writ of quo warranto filed by the attorney general or district attorney so long as it is filed

in the name of the state on relation of another who is seeking their right to the office against a person who has held over in the office when the petitioner has been elected to said office. **State ex rel Funches v. Keys,** 61 So. 2d 339, 340 (Miss. 1952). For example, had Chancellor Adams refused to relinquish the office after Griffin had been elected, then Griffin could have properly, in the name of the state and on relation of his own behalf, filed a private writ of quo warranto pursuant to **Funches** to oust Adams from office. However, this is not the situation in this case.

Instead, we have a person, Holmes (and James, perhaps, giving her the benefit of the doubt as being a party) who merely allege that Griffin is not qualified for the position; not that she has been elected and is being prevented from taking office because of a holdover person. Accordingly, the private writ of quo warranto was applicable since there was no holdover person in office to oust. Holmes and James, with the State as the appellant, merely allege that Griffin is ineligible, pointing to

this weakness rather than to the strengths of her own claim in contradiction of **State v. tucei**, 166 So. 370, (Miss. 1936). ("in order for appellant to succeed he must stand on the strength of his own claim to the office and not on the weakness of the claim of appellee.")

As applied to the facts of this case, this claim should have been brought either by the attorney general or the district attorney for the ninth chancery district, subdivision one on behalf of Ceola James.[3] Instead, we have a private writ of quo warranto brought by a voter of the district in the name of the state in relation of himself and presumably for James. As such, we have a private writ of quo warranto used where a public writ of quo warranto should have been used to contest Griffin's qualifications for office.

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[3]James claims that she was forced to file the private writ because her November 11, 1994 request to Attorney General Mike Moore to file a public writ went unanswered. However, the record does not reflect any effort by James to get the respective district attorney to pursue the public writ before pursuing the inapplicable private writ.

Both writs are still available pursuant to Miss. Code Ann. § 11-39-1 et seq. which states in its pertinent sections and parts:

> **§ 11-39-1. To what cases applicable.**
>
> The remedy by information in the nature of a quo warranto shall lie, in the name of the state, against any person or corporation offending in the following cases, viz.:
>
> First.-Whenever any person unlawfully holds or exercises the function of any public office, civil or military, or franchise, or any office in any corporation, city, town, or village, and to try the right to any such office. (emphasis added) ....
>
> **§ 11-39-3. Proceedings.**
>
> The proceedings in the cases set forth in Section 11-39-1 shall be by complaint, in the name of the state, by the Attorney General or a district attorney, on his own motion or on the relation of an-

other, and, in a case to try the right to an office, on the relation of the claimant thereof....

§ 11-39-5. Trial of right to office.

In case the proceedings be on the relation of a person claiming to entitled to an office, the ground of his claim shall be stated by proper averment, and judgment shall be rendered according to the rights of the respective claimants; and, if it be in favor of the relator, he shall be entitled to the office on qualifying according to law, and may recover of the defendant in an action all damages that may have accrued in consequence of withholding the office from him.

Under these statues, to pursue a modern public writ of quo warranto to challenge a person's qualifications to a public office, as opposed to ousting a holdover person which is done by private writ quo warranto, the claim must be by the State on its own motion or for

the person claiming the right to the office. Therefore, the proper procedure for challenging the constitutionality of Griffin's qualifications would have been by public writ of quo warranto filed by the attorney general or district attorney for James. However, James contends that this should not be held against her, with which we agree.

Despite the fact that this should have been a public writ of quo warranto, Holmes did not claim an entitlement to the chancellor position. Thus, he was an improper plaintiff for a private writ due to his lack of standing. **Andrews v. Covington,** 69 Miss. 740, 746 (1892). Although the private writ of quo warranto is inapplicable, James should have been the plaintiff as opposed to Holmes, but she was apparently not a party and instead acted as the state's and Holmes' attorney. Griffin accordingly contends that, even assuming that

the private writ of quo warranto was the proper procedural vehicle, James waived her right to being the plaintiff and did not cure such defect because she expressly "limited [their] prayer for relief to a ruling on the constitutional requirements," and thus that she is judicially estopped from resurrecting any possible claim to instatement in the office of chancellor. See, **Banes v. Thompson,** 352 So. 2d 812, 815 (Miss. 1977) ("Judicial estopped normally arises from the taking of a position by a party that is inconsistent with a position previously asserted"); **Mississippi State Highway Commission v. West,** 179 So. 279, 283 (Miss. 1938) ("as a general rule a party is estopped from taking a position which is inconsistent with the one previously assumed in the course of the same action or proceeding").

Presuming that James did become the proper plaintiff and that an appropriate writ was used and that the case should not end here for lack of a plaintiff with standing, James claims that because she received the next highest

votes in the election, that she is entitled to step into the chancellor's position should we find the Griffin is not qualified. The case of **Sublett v. Bedwell**, 47 Miss. 266, 275 (1872) explicitly states that, "the result is that if the ineligible candidate can not take office, the electors have failed to make a choice. In truth, there has been no election at all, and the minority candidate has no right to office." **Id.** Therefore, even if this Court were to find that Grifin was not qualified and that James became the proper plaintiff while presuming that her private writ was appropriate, James is still not entitled to be placed in Griffin's stead as requested pursuant to **Sublett v. Bedwell**, 47 Miss. at 276.

In summation, because this was not a suit to try ones's right to office or ousting a holdover person, this was properly not a private writ as was used. Instead, this case dealt with the constitutional eligibility of any person's right to hold the position of chancellor. In other words, the unlawful holding of an office because of an

alledged lack of necessary requirements was the real issue. Therefore, this was a case that should have been public writ of quo warranto brought by the attorney general or district attorney. Rather, this case was brought under the inapplicable private writ. Thus, since the attorney general or district attorney did not bring the suit, we find that it was properly dismissed as there was not a proper party with standing involved to pursue the claim.

In addition to Holmes' lack of standing, Judge Evans ruled that Holmes' claim was premature as well since Griffin had not taken office yet; i.e., Holmes' claim was in violation of the constitutional "ripeness" doctrine. Pursuant to Miss. Code Ann. Section 11-39-1, such a writ is for the purpose of challenging the right of someone "unlawfully holding or exercising the function of any public office." In **O'Neal v. Fairley,** 200 So. 722, 723 (Miss. 1941), this Court stated:

> in order to maintain such a proceeding [private writ of quo

> warranto for ouster] as this try the right to a public office, is must appear that the respondent is in actual possession and use of the office in question. It is not sufficient for the information to show that the respondent lays some claim to the office without usurping the functions thereof.

See also, **Hyde v. State,** 52 Miss. 665 (1876); **Andrews v. Covington,** 69 Miss. 740, 13 So. 853 (1892).

As Griffin was not in possession of or exercising any function of the office of chancellor at the time of trial, Judge Evans was correct in finding that the claim was not ripe or premature for a private writ of quo warranto. **O'Neal v. Fairley,** 200 So. 722, 723 (Miss. 1941). Additionally, the fact that Griffin has now taken office is of no effect to this case. As this Court has stated, "A cause of action must exist and be complete before an action can be commenced, and, when a

suit is begun before the cause of action arises, it will generally be dismissed if proper objection is taken." **Euclid-Mississippi v. Western Casualty & Surety Co.**, 163 So. 2d 676, 679 (Miss. 1964); **Miller v. Fowler**, 200 Miss. 776, 28 So. 2d 837 (1947). Furthermore, "The mere passage of time without refiling is not sufficient." **Euclid**, 163 So. 2d at 679 (Miss. 1964).

Accordingly, Holmes' claim was properly dismissed as premature, or not ripe, which cannot be cured with the passage of time during which Griffin has taken office without Holmes refiling. Therefore, even presuming that James was a party, it is still without merit due to a violation of the constitutional ripeness doctrine. However, under the principles of judicial economy and fairness, in conjunction with the attorney general's failure to respond to James' request to pursue the public writ of quo warranto, and in the interest of the public policy involved with the merits of the issues raised today, we will not dismiss this case for a procedural defect.

I. WHETHER THE APPELLEE MEETS THE REQUIREMENTS OF ARTICLE 6, SECTION 154 OF THE MISSISSIPPI CONSTITUTION OF 1890?

II. DOES ARTICLE 6, SECTION 154 OF THE MISSISSIPPI CONSTITUTION OF 1890 REQUIRE THAT A CHANCELLOR PRACTICE LAW IN AND BE A RESIDENT OF MISSISSIPPI FOR A FIVE YEAR PERIOD IMMEDIATELY PRECEDING HIS ELECTION, OR DOES IT MERELY REQUIRE THAT AN ELECTED CHANCELLOR HAVE PRACTICED LAW AND LIVED IN MISSISSIPPI FOR A PERIOD OF FIVE YEARS?

The central dispute revolves around the interpretation of Section 154 of the Mississipi Constitution of 1890 which states:

> **Art. 6, §154** Mississippi Constitution of 1890.
> **Section 154.** No person shall be eligible to the office judge of the circuit court or of the chancery court who shall not have

> been a practicing lawyer for five years and who shall not have attained the age of twenty-six years, and who shall not have been five years a citizen of this state.

James and Holmes contend that the drafters of the Constitution inadvertently forgot to include the language, "immediately preceding" because it appears in the requirements for many other elected officials such as Supreme Court Judges. Naturally, Griffin contends that the drafters made a conscious decision to not include such language for chancellors since it does appear in other sections of the constitution. Griffin alleges that the immediately preceding language is for those positions pertaining to statewide offices, such as Supreme Court Justice, since it does not appear in sections of the constitution pertaining to local offices such as a chancellor or circuit judge.[4]

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[4]For sections requiring a time period immediately preceding, See Miss. Const. Art. 4 §41 (two-year Sec. of

Therefore, Griffin's and James' arguments are diametrically opposed, but use similar rationale, leaving the question for the Court to decide if in fact the inclusion or absence of the "immediately preceding" language was intentional or an oversight of the drafters.[5]

State), Art. 5 §134 (five-year Treasurer), Art. 6 §150 (five-year Supreme Court judge), Art. 6 §171 (two-year Justice of the Peace), Art. 8 §202 (five-year Superintendent of Public Education); For section which do not require a time period immediately preceding, See Miss. Const. Art. 5 §135 (sheriff, coroner, tax collector, and surveyor), Art. 6 §176 (Board of Supervisors), Art. 8 §204 (county superintendent of public education), Art. 11 §230 (levee board commissioners).

[5] This Court is cognizant of the fact that our ruling on a chancellor's qualifications in the case **sub judice** impliedly rules upon circuit judge's qualifications as well since the same constitutional provision is applicable to the circuit court.

A somewhat similar discrepancy of the "immediately preceding" language occurs between Section 41 and Section 42 of Article 4 of the Mississippi Constitution of 1890. Section 41 requires that persons seeking a seat in the State House of Representatives be a citizen of that county for "two years immediately preceding his election." Section 42 involves the requirements for a person seeking a seat in the state senate but says that said person must be an actual resident "for two years before his election." James offers an Attorney General's Opinion pertaining to the interpretation of Section 41 and Section 42 as persuasive authority for construing Section 154.[6] It is unclear if such information was presented to the trial judge but it appears that it was not. There was also a pending request.

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[6] The Attorney General Opinion discussed is 1990 WL 548243 (Miss.A.G.). by James to the Attorney General on the interpretation of Section 154 which has not been answered and not part of the record as of now.

The Attorney General Opinion interpreting Sections 41 and 42 stated that the "for two years before his election" language in Section 42 meant "immediately preceding." Accordingly, James suggests that the same rationale should be applied by the Court in its interpretation of Section 154 where the "immediately preceding" language is also absent. However, Section 154 does not have language similar to the "for two years before his election" language in Section 42 where it is more plausible that the "before" language of Section 42 could mean "immediately" before. Therefore, we find that the Attorney General's interpretation of Section 42 is not analogous to our present interpretation of Section 154 dealing with chancellor qualifications despite the fact that it is merely a persuasive authority as well.

The Mississippi Constitution of 1890 is our present and fourth constitution under which the State of Mississippi has operated a government. It appears to this Court that after four

opportunities to draft such a Section as 154, that the drafters would have included the **immediately preceding** language if they had intended to do so, as they did for other positions. As the Court stated in **Ex Parte Dennis,** 334 So. 2d 369, 373 (Miss. 1976), the construction of a constitutional section is to be determined from the plain meaning of the words and terms used within it. Accordingly, we find that the plain meaning of Section 154 is that a candidate for chancellor of this state need not necessarily be a citizen for the immediately preceding five years, but instead need only have been a citizen of the state for five years prior to the election. However, this Court is also aware of our rule of law requiring the constitution to be reviewed as a whole to determine the intent of any disputed provision. **St. Louis & S.F. Ry. Co. v. Benton County,** 96 So. 689, 690 (Miss. 1923); **Green v. Weller,** 32 Miss. 650, 678 (1856).

In summary, we find that looking at the constitution as a whole pursuant to **Benton County,** and to the plain mean-

ing of the words under **Ex Parte Dennis,** that the framers and drafters did not intend to include the **immediately preceding** language under either constitutional construction principle. It appears to this Court that if the drafters of the 1890 Constitution had intended to include such language then they would have done so given the significant importance of such a provision and its inclusion in other sections. Furthermore, the preceding three constitutions did not include an "immediately preceding" residency requirement.

The decision to require an immediately preceding residency requirement is now legislative. The legislature, as the appropriate branch of government charged with the duty of enacting laws, can initiate the amendment process to the Constitution of 1890 to include such a requirement if it so chooses.

IV. CAN APPELLANT NOW ARGUE THAT APPELLEE WAS NOT A PRACTICING ATTORNEY AT THE TIME OF THE ELECTION?

This issue was listed by Griffin in his statement of issues and it is not listed as an issue in Holmes' brief but is addressed in his brief. The parties' stipulated facts at the conclusion of trial included the fact that Griffin had practiced law on a limited basis in Mississippi from 1992 to present. Naturally, this would procedurally bar Holmes from contesting such a fact on appeal. **See Wilbourn v. Hobson,** So. 2d 1187, 1189 (Miss. 1992) ("factual stipulations set boundaries beyond which this Court cannot stray"). Accordingly, this issue is not properly before the Court, not requiring a discussion or analysis.

CONCLUSION

We find that this case was properly decided by the trial court on all matters. The incorrect writ of quo warranto was used and Holmes did not have standing under the inapplicable quo warranto was used and Holmes did not have standing under the inapplicable quo warranto writ either. See Miss. Code

Ann. §11-39-1 et seq.; **Andrews v. Convington,** 69 Miss. 740, 746 (1892). The action was premature and not cured with the passage of time. **O'Neal v. Fairley,** 200 So. 722, 723 (Miss. 1941); **Euclid-Mississippi v. Western Casualty & Surety Co.,** 163 So. 2d 676, 679 (Miss. 1964). Furthermore, Section 154 does not imply or give any indication from the plain meaning of its words, that it was meant to include "immediately preceding" language. Instead, the contrary is our finding today. Holmes and James are also procedurally barred from arguing that Griffin was not a practicing attorney at the time of the election since it was a fact stipulated by the parties at trial. **Wilbourn v. Hobson,** 608 So. 2d 1187, 1189 (Miss. 1992).

The case **sub judice** was dismissed by the trial court which nevertheless went on to rule upon the constitutionality of Section 154. Likewise, we find it necessary and in the public interest and policy to rule upon Section 154. Section 154 only requires that a person be a citizen and a practicing attorney

for a total of five years preceding the election, not necessarily the five years immediately preceding the election exclusively. Accordingly, the trial court is affirmed on its constitutional interpretation of Section 154 as it coincides with the drafters' intentions.

JUDGMENT IS AFFIRMED

HAWKINS, C.J., LEE AND PRATHER, P.JJ., SULLIVAN, BANKS AND SMITH, JJ., CONCUR. PITTMAN, J., DISSENTS WITH SEPARATE WRITTEN OPINION. McRAE, J., DISSENTS WITH SEPARATE WRITTEN OPINION.

IN THE
SUPREME COURT OF MISSISSIPPI

NO. 94-CA-01275-SCT

STATE OF MISSISSIPPI ON RELATION OF
ERNEST HOLMES

v.

WILLIAM L. "BILL" GRIFFIN, JR.

PITTMAN, JUSTICE, DISSENTING:

I would agree with the result as found by the majority, however, this case should have been dismissed because of the procedural defect of the appellant not having standing to bring an action in the nature of quo warranto. Therefore, I dissent.

IN THE
SUPREME COURT OF MISSISSIPPI

NO. 94-CA-01275-SCT

STATE OF MISSISSIPPI ON RELATION OF
ERNEST HOLMES

v.

WILLIAM L. "BILL" GRIFFIN, JR.

McRAE, JUSTICE, DISSENTING:

The merits of this case are properly considered as a matter of public and for the sake of judicial economy and fairness. However, I must dissent from the majority in its interpretation of Art. VI, §154 of the Mississippi Constitution of 1890 because of its conflict with the intended purpose of this section.

Art. VI, §154 establishes the following qualifications for circuit and chancery court judges:

> No person shall be eligible to the office of judge of the circuit court or of the chancery

> court who shall not have been a practicing lawyer for five years and who shall not have attained the age of twenty-six years, and who shall not have been five years a citizen of this state.

The purpose of establishing the five year citizenship requirement is so that an individual is familiar with the local interests, law, and needs of this state. If we interpret this section of our constitution to permit an individual to fulfill the citizenship requirement for circuit or chancery court judge by having been a citizen of this state for any five years of his life, as opposed to five years preceding election, the purpose of this section of our constitution is lost.

> The same reasoning [for the circuit and chancery court judge qualifications] applies here as to the supreme court judges set forth in a preceding section. A person before assuming so important an office as judge of one of these courts, should certainly be permanently identified with the state, and have acquired that knowledge and familiarity with its interest and needs and laws and institutions

> as to give him a rounded knowledge of both the legal and practical side of the courts and the administration of justice.

George H. Etheridge, **Mississippi Constitutions** 279 (1928). The majority certainly does not suggest any other purpose for the five year citizenship requirement in this section. One who has not been a citizen for the five years immediately preceding his term of office is obviously less familiar with the changing local interests, law and needs of this state. The competence to carry out the duties of this office likely decreases in direct relation to the intervening period of time spent as a citizen of another state. The citizenship requirement could just as well serve no letitimate purpose if the majority's interpretation prevails. If the majority's analysis and literal reading of § 154 is carried a step further, an individual would not be required to have practiced law in this state for five years. The entire objective of having qualified judges is destroyed as a result.

Our constitution should not be read as setting forth arbitrary qualifi-

catons for our circuit and chancery court judges. It is the duty of this Court to uphold the intent of our constitution and not rest upon the legislature's duty of enacting laws to give significance to the provisions of our constitution. Accordingly, I dissent.

SUPREME COURT OF MISSISSIPPI
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This is to advise you that the Mississippi Supreme Court rendered the following decision on the 15th Day of February, 1996.

Supreme Court Case #94-CA-01275
Trial Court Case #94CV13174

State of Mississippi on Relation of
Ernest Holmes
vs.
William L. "Bill" Griffin, Jr.

Petition for Rehearing denied. McRae, J., would grant.

Supreme Court Clerk

lwp

ccs: Stephen Lee Thomas
AG notified via list
Washington County Circuit Clerk

* NOTICE TO CHANCERY/CIRCUIT/
COUNTY COURT CLERKS *

If any original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

IN THE
SUPREME COURT OF MISSISSIPPI

NO. 94-CA-01275-SCT

STATE OF MISSISSIPPI ON RELATION OF
ERNEST HOLMES

v.

WILLIAM L. "BILL" GRIFFIN, JR.

ORDER

This matter has come before the Court on Motion for a Stay of Mandate Pending Application for a Writ of Certiorari filed February 21, 1996 by Ernest Holmes, by which the movant seeks a stay of the mandate in this case, pending the application for a writ of certiorari in the United States Supreme Court. The mandate in this cause issued from this Court on February 22, 1996, and the Court finds it should be recalled, and that, in accordance with M.R.A.P. 41(c) it should be stayed for thirty days, pending the filing of such application.

IT IS, THEREFORE, ORDERED that the mandate issued by this Court in this case be and the same is hereby recalled.

IT IS FURTHER ORDERED that such mandate be stayed for a period of thirty days following its entry on February 22, 1996. In the event that during the period of such stay there is filed with the Clerk of this Court a notice from the Clerk of the United States Supreme Court that Ernest Holmes has filed a peririon for the writ in that Court, the stay shall continue until final disposition by that Court. Upon the filing of a copy of an order of the United States Supreme Court denying the pertition for writ of certiorari, the mandate shall issue immediately.

SO ORDERED, this, the 26th day of February, 199.

(S) James L. Roberts, Jr.
FOR THE COURT

IN THE SUPREME COURT OF MISSISSIPPI

STATE OF MISSISSIPPI
ON RELATION OF ERNEST HOLMES — Appellant

V.

WILLIAM L. "BILL" GRIFFIN, JR.

Appellee

ORDER

This matter comes before the Court on Appellant's Motion for Extension of Stay. By Order dated February 26, 1996, this Court granted a stay of the mandate in this matter to Appellant for thirty days from February 22, 1996, so that Appellant could file an application for writ of certiorari in the United States Supreme Court. Appellant now requests an extension of that stay. After consideration the Court finds that the Motion for Extension of Stay is well taken and should be granted.

IT IS THEREFORE ORDERED that Appellant's Motion for Extension of Stay be and the same is hereby granted. The mandate shall be stayed for an additional fifteen days.

SO ORDERED this the 25 th day of March, 1996.

S/ James L. Roberts, Jr.